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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 468.

DANIEL REEVES, INC.,

Petitioner,

—against—

CHARLES W. ANDERSON, individually and as Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT

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Supreme Court of the United States.

OCTOBER TERM—1930.

No. 463.

DANIEL REEVES, INC.,

Petitioner,

—against—

CHARLES W. ANDERSON, individually and as a Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITIONER'S BRIEF.

Statement.

This petition brings for review the determination of the Circuit Court of Appeals for the Second Circuit in an action at law in which the petitioner was the plaintiff in error and the respondent was the defendant in error. The opinion of the Circuit Court of Appeals has not yet been reported. The determination in the Circuit Court of Appeals affirmed a judgment dismissing the complaint rendered by the District Court of the United States for the Southern District of New York in the action in which the petitioner was the plaintiff and the respondent was the defendant. The judgment was rendered after a trial to the Court without a jury, upon a written stipulation waiving a jury trial (R. 11-12) and upon a written stipulation of facts (R. 12-15). The Court made special findings of fact embodying the facts as stipulated (R. 16) and made a decision including special conclusions of

law (R. 16-18). The decision incorporated the opinion which had been rendered by the District Court upon a motion theretofore made by the plaintiff for judgment on the pleadings in this action as well as in a number of similar actions (R. 16). The opinion thus incorporated is reported under the title *"Regla Coal Company v. Bowers"*, 37 Fed. (2nd) 373.

Ground Upon Which Jurisdiction Is Invoked.

This Court has brought this proceeding before it by a writ of certiorari pursuant to a petition filed under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a). The judgment of the District Court was entered on March 6, 1930 (R. 11). The order for mandate of the Circuit Court of Appeals was filed July 28, 1930 (R. 40).

Statement of the Case.

The facts as stipulated by the parties (R. 12-15) were incorporated as a whole as special findings of fact in the decision (R. 16). These facts, so far as pertinent, are chronologically as follows:

On **March 11, 1920,** the plaintiff filed its income and profits tax return for the year ended December 31, 1919, and duly paid to the Collector an aggregate of $80,479.75, as shown by the return, which plaintiff believed in good faith to be the entire amount due from it (R. 12).

In **March, 1924,** the Commissioner made an additional assessment in the sum of $1,886.79 against the plaintiff (R. 14).

On **April 5, 1924,** the Collector of Internal Revenue made demand on the plaintiff for this additional assessment (R. 13).

On **April 16, 1924,** the plaintiff filed a claim for the abatement of the additional assessment (R. 14).

On **September 28, 1925,** the claim in abatement was rejected (R. 14).

On **November 14, 1925,** the defendant, as Collector of Internal Revenue, collected from the plaintiff the sum of $2,061.31, and the plaintiff paid this sum involuntarily, under duress and under protest (R. 13).

No proceedings of any kind for the collection of this amount were had or taken between March 11, 1920, when the original return was filed, and November 14, 1925, when the collection was made, a period of over five years. No bond was filed by the plaintiff in connection with the claim in abatement (R. 14); nor was any agreement entered into pursuant to which the collection was delayed (R. 14); nor was any writing of any kind entered into, pursuant to which the period of limitations applicable to the tax was extended (R. 15).

On **April 27, 1927,** plaintiff filed a claim for refund of the amount collected from it, and otherwise complied with the conditions precedent to the commencement of this action (R. 13).

Specification of Errors.

The petitioner contends that the Court below erred

(a) in holding that the effect of Sections 607 and 611 of the Revenue Act of 1928, is to bar actions at law for the recovery of taxes illegally collected, as were those in the case at bar; and

(b) in holding that those sections are constitutional if they have that effect.

Summary of Argument.

(a) The taxes in question were levied under the Revenue Act of 1918, which prescribed a five-year limitation upon collection. The effect of Sections 607 and 611 of the Revenue Act of 1928, was to permit the *Commissioner of Internal Revenue* to make voluntary refunds of all taxes collected after the expiration of the statutory period, in accordance with the decision of this Court in the *Albany Lighterage* case, 273 U. S. 346, except in cases where a claim in abatement had been filed by the taxpayer and collection was stayed; but that in cases where such claim was filed and such stay was secured, the *Commissioner* was prohibited from making voluntary refund or credit, *and the taxpayer was relegated to his action at law against the Collector; but that such action at law was in no wise interfered with.*

(b) Section 611 of the Revenue Act of 1928, has no application in any case, unless there was an actual stay of collection pending the determination of the claim in abatement.

(c) If Section 611 of the Revenue Act of 1928, is to be interpreted as defeating a common law action against the Collector for the recovery of a tax illegally collected after the expiration of the statutory period, then it is unconstitutional as depriving the taxpayer of his property without due process of law.

(d) Such unconstitutional effect may be obviated by applying Sections 607 and 611 of the Revenue Act of 1928, only to cases where the claim for refund was made after the adoption of the Act, and where, therefore, the taxpayer had not complied with all conditions precedent to the commencement of the action before the legislation was adopted.

The Statutes Involved.

Section 250 (d) of the Revenue Act of 1918:

> "Sec. 250. * * * (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due." 40 Stat. 1083.

Section 277 (a) (2) of the Revenue Act of 1924:

> "Sec. 277 (a) (2). The amount of income, excess profits and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, *the Revenue Act of 1917, the Revenue Act of 1918*, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be taken after the expiration of such period." (43 Stat. 253, 299.)

Section 1106 (a) of the Revenue Act of 1926:

> "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate

to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax." 44 Stat. 113, 26 U. S. C., §1249 note (26 U. S. C. A., §1249 note.)

Revenue Act of 1928, Sections 607, 611 and 612:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." 45 Stat. 874, 26 U. S. C., §2607 (26 U. S. C. A., §2607).

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." 45 Stat. 875, 26 U. S. C. 2611 (26 U. S. C. A., §2611).

"Sec. 612. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926." 45 Stat. 875.

Argument.

POINT I.

The provisions of Section 611 of the Revenue Act of 1928 do not bar an action at law against the collector.

If the Congress, in adopting Sections 607 and 611 of the Revenue Act of 1928 had intended so drastic a measure as to take from taxpayers rights of action which they then had for the recovery of amounts illegally collected from them, more inappropriate language to accomplish such result could hardly have been chosen. No word appears expressly validating such collection. No language appears precluding the appropriate Court from granting judgment in favor of the aggrieved taxpayer. Section 607 merely authorizes *a refund* or *a credit* of such collections in general, and Section 611 merely excepts from the operations of Section 607 the cases where assessments were made prior to June 2, 1924, claims in abatement were filed and collections stayed.

To *credit* or to *refund* is characteristically the function of the Commissioner of Internal Revenue and not of the Courts of the United States (R. S., §3228; 26 U. S. C. A., §157). The claim for refund is "presented to the Commissioner" (R. S., §3228; 26 U. S. C. A., §157). Indeed, the Court has not the machinery by which a credit could be effected, even should it so desire. Our point therefore is that Section 607 merely conferred upon the *Commissioner of Internal Revenue* the power denied him under Section 1106 (a) of the 1926 act to make refund or credit in a normal case of collection after the statutory period, in full obedience to the determination of this Court in the *Albany Lighterage* case (273 U. S. 346), and

that Section 611 withheld such authority in a case where the abatement claim was filed and collection stayed, relegating in such case the taxpayer to his action at law.

Such is the apparent requirement of the plain language of the statute. Such requirement is fortified by the history of these sections.

The Revenue Act of 1918 under which the taxes in this case were levied as well as the subsequent acts contained provisions prescribing the period during which taxes levied thereunder could be collected.

The Revenue Act of 1924 which was enacted on June 2, 1924, provided that in cases where the assessments had been made within the period permitted for assessments under the earlier acts, collections might be made within six years after the date of the assessments.

The Internal Revenue authorities apparently proceeded upon two suppositions. In the first place they supposed that the limitations upon collections prescribed in all of the Revenue Acts were mere limitations upon *actions* for collections, but not upon distraints. The second supposition apparently was that under the 1924 act, assessments made under the earlier acts, both before and after June 2, 1924, were brought within the provision permitting collection within six years after the assessment.

On December 7, 1925, the Court of Claims decided the case of *Toxaway Mills* v. *U. S.* (61 Ct. Cls. 363). That case held that where collections were made after the statutory period had run, the taxpayer could none the less recover only the amount by which the collection made exceeded the taxpayer's true liability. The holding proceeded upon the theory that the expiration of the period under the earlier acts only barred the remedy *but did not extinguish the taxpayer's liability.*

When Congress had before it for consideration the Revenue Act of 1926, this Court had already decided the case of *Graham* v. *Dupont* (262 U. S. 234), which had foreshadowed the ultimate decision made in the *Albany Lighterage* case, and Section 1106 (a) was proposed to be included in the Revenue Act of 1926. This section was reported to the Congress by a Conference Committee (House Report 356, p. 55, 69th Congress, First Session) as follows:

> "Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, *C. J.*, in *Graham* v. *DuPont* (262 U. S. 234, 256, 258.)."

From this report it is evident that the Congress intended to legislate away the effects of the *Toxaway Mills* case and to provide that upon the expiring of the limitation periods in the preceding acts not alone *was the remedy for collections barred, but the taxpayer's liability itself was extinguished.*

Section 1106 (a) of the Revenue Act of 1926 (quoted above, pp. 5, 6), however, provided that although the liability of the tax payer had been *extinguished* by the limitation, no *refund* or *credit* could be made except to the extent that the collection exceeded the taxpayer's true liability. It is notable that the Circuit Court of Appeals for the Second Circuit decided in *Ellay Co.* v.

Bowers (25 Fed. (2nd) 637) that the effect of Section 1106 (a) was to permit the taxpayer to recover by action against the collector the entire amount of a collection exacted after the running of the limitation period, but that a voluntary *refund* or *credit* could be made only to the extent that the collection constituted overpayment.

Then came the decision of this Court in the *Albany Lighterage* case which held that the expiry of the limitation periods affected collections by distraint as well as collections by suit, and that taxpayers might recover the entire amount collected from them by distraint.

When the Congress met for the Session of 1928, also, there were pending in the Courts cases in which the taxpayers claimed that the 1924 act properly applied the six-year extension for collection only to assessments made under the earlier acts where such assessments were made after June 2, 1924, the date when the 1924 act went into effect, and indeed, on January 2, 1929, this Court decided in *Russell* v. *U. S.* (278 U. S. 181) that only the assessments made after June 2, 1924, were subject to such lengthened period for collection.

Under these circumstances the Revenue Act of 1928 was adopted. Section 612 of the 1928 act (quoted above at p. 6) repealed 1106 (a) as of its enactment date. In place thereof Section 607 was enacted. Section 607 gave the Commissioner the authority to make refund or credit of the entire amount which had been illegally exacted from the taxpayer after the expiry of the limitation period, but in doing so, the Congress apparently felt it necessary to enact a legal fiction, *i. e.*, that the entire amounts so collected "shall be considered an overpayment". Section 611 of the Revenue Act of 1928 excepted from the operation of Section 607 assessments made prior

to June 2, 1924, *i. e.*, assessments which were thought to be, and which by the *Russell* case this Court afterwards held, exempt from the extended period for the collection as provided for in the 1924 act; so that where assessments were made too early to enable the collector to have an additional six years for collection, the Commissioner was not authorized to make voluntary credit or refund under the provisions of Section 607.

The history of this legislation thus considered seems conclusive upon the proposition that the Congress intended that the effect of the limitation period was to extinguish the taxpayer's liability and to render mandatory recovery at law for the full amount collected after the statutory period.

So far, however, as concerned assessments which were not affected by the 1924 act, the Congress was not content to have refund made by purely administrative action, but desired rather that all issues of fact involved in a procedure for recovery be determined by the Court and jury in an action at law.

The Court below, in commenting upon this phase of the controversy, acknowledged that the argument was plausible (R. 37) but refused to adopt the point of view here contended for, for two reasons: In the first place, the Court stated that it could not be that the Congress would permit the cause of action against the Collector to survive the enactment, and still require the filing of a claim for refund as a condition precedent (Section 3226 R. S.) where by hypothesis the claim for refund would necessarily have to be abortive. In the second place, the Court could see no logic in precluding the Commissioner of Internal Revenue from making credit or refund, a convenient and speedy administrative func-

tion, while at the same time permitting the Courts to grant a recovery.

We respectfully submit that the two objections made by the Court below do not answer the argument.

On the first point, as above noted, the same Court found no inconsistency in the *Ellay* case (*supra*), in holding that the taxpayer could recover the illegal payment under Section 1106 (a) of the Revenue Act of 1926, although that very section precluded a *refund* or *credit* of that amount by the Commissioner. Good reason might have determined the Congress in requiring at least six months' advance notice to the Internal Revenue Department before an action could be started, so as to enable the Department to prepare its evidence against the time of trial, and possibly, also, to prepare its budget against the day when judgment might be rendered. The filing of the statutory claim for refund, before the commencement of the action, would have provided such notice.

Nor would it seem to answer our contention that the Congress could not have purposefully permitted the Courts to grant a recovery while denying the Commissioner the right to grant a refund or a credit. There would seem to have been reason enough for the Congress to confide in the Courts alone the task of determining the rights of the taxpayer to the recovery of the moneys involved in these cases where claims in abatement had been filed.

The Congress in the 1928 session was greatly concerned with the amounts of refunds which apparently would result from the determination of this Court in the *Albany Lighterage* case, and deemed it inadvisable to permit a mere administrative officer, such as the Com-

missioner of Internal Revenue, to deal with the entire matter. Thus, in Section 710 of the Revenue Act of 1928 (45 Stat. 882, 26 U. S. C. A., 2710) it was provided:

> "No refund or credit of any income, war profits, excess profits, estate or gift tax, in excess of $75,000 shall be made after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation * * *."

With the point of view toward administrative refunds thus made manifest, it is not surprising that the Congress should have attempted to safeguard in every way the repayment to taxpayers of amounts collected from them after the statutory period had elapsed, where the Commissioner, on claims for abatement, had passed his judgment upon the correctness of the tax liability as assessed. In every such case, there remained issues of fact to be disposed of favorably to the taxpayer before the taxpayer would have a right of recovery.

Section 250 (d) of the Revenue Act of 1918 (quoted p. 5) made the statutory period inapplicable "in case of false or fraudulent returns with intent to evade the tax." Thus, fraud or good faith an issue of fact would be created which the Congress might with much logic have preferred to entrust to a court and jury rather than to the Commissioner of Internal Revenue. In the instant case, be it noted, it was found that the plaintiff's return was filed in entire good faith (R. 13), and there was

no fraud or element of fraud in connection therewith (R. 14). Moreover, in many cases, the taxpayer signed papers purporting to be stipulations or other waivers of the statutory period. Questions of fact and of law might arise as to the authenticity, validity or effect of such waivers and stipulations. These questions likewise the Congress might well have desired to become the subject of judicial determination rather than of administrative decision.

We shall contend in another point that to give these sections the construction contended for by the Government, would be to render them unconstitutional. Under the construction for which we contend, the sections remain valid and enforcible enactments. As between such two constructions, that which is constitutional is always preferred.

As we shall also demonstrate in a later point, the cause of action for the recovery of a tax illegally collected, has its origin in the common law, and it is indeed an action for money had and received. The construction of these sections contended for by the Government would destroy this common law right. Statutes are not considered to be in derogation of the common law unless their language forcibly so requires. In the absence of specific reference in these sections to common law actions for recovery of illegal collections, no such construction as that for which the Government contends would seem to be justified.

Therefore, the language of these sections, their history, the legislative policy involved, and recognized canons of construction, all require the interpretation urged by petitioner.

POINT II.

Section 611 of the Revenue Act of 1928 has no application because the collection of the tax was not stayed pending the claim in abatement.

In view of the number of similar cases which are to be argued with the case at bar, upon which briefs will be filed, which fully cover the present point, we shall not present our views in detail. We content ourselves with merely presenting a point of view which seems to confound the contention of the Government under this head.

The cases in the lower Courts, which have upheld the Government's contention, have reached the conclusion that the mere administrative delay by the Collector, a mere withholding of action on his part pending the claim in abatement, was a sufficient stay under the provisions of Section 611. This amounts to a holding that a mere delay of collection, voluntary or involuntary, was sufficient. If this conclusion be correct, then all reference in Section 611 to a stay is pure surplusage; for it cannot be escaped that unless there were a delay, voluntary or involuntary, such case as this could never arise. If the Collector did not delay collection for some reason, then by hypothesis he proceeded promptly to collection, and the limitation period would not have expired prior to collection.

The Courts do not incline toward a construction of a statute which renders so large a portion of the statute unnecessary. The argument that provisions for a compulsory stay without a bond are difficult to find in the statutory law, is not conclusive. The general practice of obtaining stipulations from taxpayers, waiving the

Statute of Limitations, or extending the period of limitations, was quite prevalent. In cases where such stipulations were executed by the Commissioner, the hand of the Collector was stayed without the filing of a bond. Indeed, Section 205, subdivision B of Title 2 of the Revenue Act of October 3, 1917 (40 Stat. 305), did provide for a compulsory stay upon the filing of a claim in abatement, even in the absence of a bond, and of course the Government will concede that the sections providing for a compulsory stay with bond were numerous.

In common legal parlance, the word "stay" connotes a restraint, and is the very antithesis of voluntary inaction.

POINT III.

If Section 611 is construed as barring such actions as this, then it violates the Fifth Amendment of the Constitution.

To present in their true perspective the various branches of our argument under this point, it may be helpful to introduce the matter in outline form.

I. Result of the expiration of the period prescribed by Section 250 (d) of the Revenue Act of 1918 was to extinguish the liability of the taxpayer and not merely to bar a remedy,

(a) because it was a statutory limitation upon a statutory right (1) the tax liability being purely statutory in its origin, and

(b) because Congress intended that the limitation periods should extinguish the liability and not merely bar the right, and

(c) because the courts have recognized that the liability was extinguished in permitting the taxpayers to recover the amounts collected after the expiration of the statutory period.

II. The cause of action which the taxpayer has for the recovery of a tax illegally exacted from him, is one granted by the common law, and this right had fully matured prior to the enactment of the Revenue Act of 1928.

(a) Such cause of action is property which may not be taken without due process of law.

III. If Sections 607 and 611 are so construed as to deprive the plaintiff of its cause of action, then they are unconstitutional as taking the plaintiff's property without due process of law,

(a) the legislative re-creation of a liability after the expiration of a period of limitation upon the statutory right constituting a taking of property;

(b) the legislation not being a ratification of the earlier collection for the reason

(1) that the intention to ratify was not expressed, and

(2) Congress would have been incapable of ratifying the Act in 1928, and

(c) Congress having been incapable in 1928 of constitutionally imposing the 1920 tax anew.

IV. There is no power in the Congress to take property without due process of law even when such taking may seem fair to the Court.

I. *The result of the expiration of the period prescribed by Section 250 (d) of the Revenue Act of 1918 was to extinguish the plaintiff's liability and not merely to bar the remedy of the Collector.*

(a) *The limitation provided in that section was a statutory limitation upon a right of purely statutory origin.* The liability which the plaintiff owed to the government by way of taxes for the year 1919 was a liability of purely statutory origin. The Constitution, Article I, Section 8 confided the duty of laying taxes to the Congress:

> "The Congress shall have the power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States * * *."

This Court said in *Merriweather* v. *Garrett*, 102 U. S. 472, 501:

> "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

The tax liability thus being a creature of statute is not a debt in any sense of the word. *Lane County* v. *Oregon*, 74 U. S. 71, 78, 80; *Bristol* v. *Washington*, 177 U. S. 133, 147, 148; *Moore* v. *Mitchell*, 30 Fed. (2d) 600, 602 (2d Circuit); *St. Joseph's Land Co.* v. *Mac Lean*, 37 Fed. (2d) 984, 987 (8th Circuit); *Liberty Mutual Insurance Co.* v. *Johnson*, 6 Fed. (2d) 752, 755 (Decree Affirmed in *Stripe* v. *U. S.*, 269 U. S. 503).

It is to be noted, therefore, that the tax liability of the plaintiff for the year 1920 had its origin in the Revenue Act of 1918. That very Act in Section 250, subdivision (d) prescribed the limitation, and in definite language negatively provided:

> "No suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

We then have here a case where there was a liability arising out of statute, and the same statute prescribed a limitation.

It has been the invariable holding of this Court that where a limitation is appended to a statutory liability, upon the expiration of the limitation period the liability itself is completely extinguished. It is not merely a case of a bar arising against remedies. This is true although the limitatiton may not be in the same statute which imposes the liability. It is universally recognized, however, that the strongest case for extinction of liability is made out where the same statute imposes the liability and fixes the limitation. The Courts of the several states recognize this rule.

Hester v. *City of Brockton*, 251 Mass. 41.

The rule was thus laid down by Mr. Justice Holmes in *Davis* v. *Mills*, 194 U. S. 451:

> "The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or

> in the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability, so specifically as to warrant saying that it qualified the rights."

This rule has been applied by this Court in a great variety of cases. Among those are cases of a statutory liability of corporate directors, *Davis* v. *Mills,* 194 U. S. 451; statutory liability for death by wrongful act, *The Harrisburg,* 119 U. S. 199; statutory rights of shippers to recover excess payments made to railroads, *A. J. Phillips* v. *Grand Trunk Western Railway,* 236 U. S. 662; *Danzer* v. *Gulf R. R. Co.,* 268 U. S. 633; *Atlantic Coastline R. R.* v. *Burnette,* 239 U. S. 199; statutes giving sub-contractors the right to sue in the name of the United States upon performance bonds given to United States by general contractors, *Texas Cement Co.* v. *McCord,* 233 U. S. 157, 162, *Title etc. Co.* v. *Harlan & Hollingsworth,* 228 U. S. 567, 571.

The lower Federal Courts have also recognized the rule in the following cases: Statutory limitation upon a statutory right to sue for conflagration caused by a railroad train, *Denver & R. G. R. Co.* v. *United States,* 241 Fed. 614; and it is to be noted that rule applies even as against the United States; statutes creating maritime liens, *The Edna,* 185 Fed. 206, 208.

This Court seems to have applied the same rule to a statutory tax liability arising under a state law, *Bristol*

v. *Washington County*, 177 U. S. 133, 148. The very point has been decided as applying to Federal tax liability in *Bashara* v. *Hopkins*, 290 Fed. 592 (Aff. 295 Fed. 319), where the following language was used:

> "Therefore it must follow, as a matter of course, that a collection of a tax made beyond the period allowed by law would be 'illegal', and such a collection would stand exactly upon the same basis as a collection made under an unconstitutional statute. * * * This recognition of the difference between a limitation in a special act and a general statute of limitations renders inapplicable such decisions and texts as paragraph 4, 17 Ruling Case Law, 66; *Hopkirk* v. *Bell*, 3 Cranch, 454, 2 L. Ed. 497; *Edwards* v. *Kearzey*, 96 U. S. 598, 24 L. Ed. 793; *Campbell* v. *Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483; *Campbell* v. *City of Haverhill*, 155 U. S. 612, 15 Sup. Ct. 217, 39 L. Ed. 280—which hold that the plea of limitation defeats the remedy only, the debt remaining."

(b) ***There is abundant evidence that in enacting the limitation sections in the successive Revenue Acts, the Congress intended to extinguish the taxpayers' liability.*** In the House of Representatives' Report No. 179, the following language was used with relation to the Revenue Act of 1924:

> "The purpose of a limitation upon assessment is to assure the taxpayer that after the period has run and no assessment has been made, no taxes may be collected from him."

Such assurance would be worse than illusory if the taxpayer, relying upon the limitation, made his business

commitments without regard to any possible tax liability, and found that a subsequent Congress experiencing a change of heart could reimpose the tax.

So, likewise, evidentiary of this interpretation is the adoption of Section 1106 (a) of the Revenue Act of 1926, which, by the history of the section above set forth, was intended to correct the misapprehension of Congressional purpose in the *Toxaway Mills* case. For in Section 1106 (a) the Congress, speaking generally of Internal Revenue Tax liabilities, said:

> "The bar of the statute of limitations against the United States in respect of *any* Internal Revenue Tax shall not only operate to bar the remedy but shall extinguish the liability * * *." (Italic ours.)

This Court in effect recognized such intent on the part of Congress in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346. There the argument apparently was not made that the liability was extinguished, but this Court expressed the same thought in a different way, as follows:

> "The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the Collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit."

Obviously, the mischiefs referred to by this Court were the uncertainty as to the liability for taxes in respect of past years and the fears entertained by business men relative thereto which constituted a brake upon commercial and industrial progress.

(c) *The courts have recognized that the liability was extinguished by permitting taxpayers to recover amounts collected after the statutory period.* Both this Court and the lower Courts have recognized the right of a taxpayer to recover amounts collected from him after the expiration of the statutory period.

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346;
Ellay Co. v. *Bowers*, 25 Fed. (2nd) 637.

This ruling establishes that the liability for the tax was extinct at the time of the collection. It is a well recognized principle that when a creditor collects under duress the amount of an ordinary debt which was barred by an ordinary statute of limitations, the debtor cannot recover.

Cunningham v. *Hussey*, 122 Maine 565;
Briggs v. *Withey*, 24 Mich. 136;
Baeth v. *Chapoton*, 115 Mich. 506;
Wilbur v. *Blanchard*, 22 Idaho 517.

The very holding of the *Albany Lighterage* case compels the conclusion that the effect of Section 250 (d) of the Revenue Act of 1918 was to extinguish the plaintiff's liability.

The District Court in disposing of our contention held that the rule laid down in *Campbell* v. *Holt*, 115 U.

S. 620, as applying in cases of ordinary statutes of limitation against debts, was controlling. All that we have said above, we believe, renders that position untenable. This Court recognized in *Campbell* v. *Holt*, that a common law liability for debt persists forever. But for a statute of limitations it could be collected forever. The limitation being in bar of the common law right, is held in such cases merely to go to the remedy and, therefore, when the statute is repealed after the period has expired, the common law right persists without defense. The principle cannot apply where the liability is the creature of statute and persists only so long as the statute gives it life. *Danzer* v. *Gulf, etc., Ry. Co.*, 268 U. S. 633.

II. *The plaintiff's cause of action for the recovery of a tax illegally exacted is one granted by the common law, and this right had fully matured prior to the enactment of the Revenue Act of 1928.*

The general proposition that the cause of action of a taxpayer situated as is the plaintiff here is a right granted by the common law was stated by Mr. Justice Holmes in *United States* v. *Emery et al.*, 237 U. S. 28, as follows:

> "The right to sue the Collector for an unjustified collection was given by the common law."

We also refer to *State Tonnage Tax Case*, 79 U. S. 204, 209, 221, 223.

The theory, of course, is that when statutory authority for the collection fails by reason of the unconstitutionality of the statute or its expiration, the collector no longer is the agent of the Government but proceeds as a private wrongdoer.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, page 282, this Court said:

> "The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another."

The Court is also referred to

> *Old Colony Trust Co.* v. *Seattle*, 271 U. S. 426;
> *Erskine* v. *Van Arsdale*, 15 Wallace 75.

This common law right of action against the defendant was vested in the plaintiff prior to the enactment of the 1928 Act.

The Court below in its decision (R. 16) held:

> "Second: The collection by the defendant of the sum of $2061.31 on November 14, 1925, constituted an illegal collection.
>
> Third: On November 14, 1925 and immediately thereafter the plaintiff had a good and substantial cause of action against the defendant for the recovery of the sum of $2061.31 with interest thereon from November 14, 1925."

A right of action is property which may not be taken without due process of law in contravention of the Fifth Amendment.

In *Pritchard* v. *Norton*, 106 U. S. 124, this Court held, at page 132:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."

We also refer the Court to *Auffm' Ordt* v. *Rasin*, 102 U. S. 620, 622; *U. S. F. & G.* v. *Struther*, 209 U. S. 306, 314; *Texas Cement* v. *McCord*, 233 U. S. 157, 162; *Angle* v. *Chicago etc. Ry. Co.*, 151 U. S. 1; *Forbes Pioneer Boatline* v. *Commissioners*, 258 U. S. 338.

From the standpoint of the matter now under consideration, however, we believe that the cases in the actions against the Collectors in the District Court stand upon even a firmer ground than actions against the United States in the Court of Claims and should be decided in favor of the taxpayer even though the actions which have been brought against the United States may be decided another way. It is recognized that a sovereign may grant to its citizens the right to sue or may withhold such right. The right once granted, does not, it would seem, stand upon the same firm and immutable basis as does the common law right which under this heading we have been discussing.

III. *If Section 611 is so construed as to deprive the plaintiff of its cause of action, or as recreating the extinct tax liability for the year 1920, then it is unconstitutional as taking the plaintiff's property without due process of law.*

The authorities last cited under the foregoing head are clearly to the effect that if Section 611 of the Revenue Act of 1928 takes away the cause of action which is vested in this plaintiff, it is taking the plaintiff's property without due process of law. No useful purpose, it seems, would be served by multiplying authorities upon that point. We, therefore, here consider the proposition from the standpoint of the re-creation of a liability which has already been extinguished.

(a) *The re-creation of liability amounts to the taking of property without due process of law.*

The outstanding case upon this point is *Danzer* v. *Gulf etc. R. R. Co.*, 268 U. S. 633. That case dealt with the limitation provisions included in the legislation providing for Government operation of railroads during the World War, and particularly with the provision which sought to re-create liabilities and extend a period of limitations already expired under the various transportation acts. This Court held in the first place that the case of *Campbell* v. *Holt* had no application to the case because the liability was statutory in its origin. Coming then to the provisions of Section 206 (f) of the Act which apparently was intended to re-create liability, this Court said:

> "Section 206 (f) will not be considered retroactively to create liability. To give it that effect would be to deprive the defendant of its property without due process of law in contravention of the Fifth Amendment."

A valuable discussion of this subject also is to be found in the opinion of Judge Sanborn in *Eberhart* v.

United States, 204 Fed. 884, 890, 891, 892, 893. Judge Sanborn said in part:

> "If the Act of 1911 has any effect, it has the effect to deprive these sureties, who are free from all liability to the bank, of $23,693.44, and to transfer that amount of their property to the bank. This was done, if it was done at all, not by any process of law, but by the arbitrary act of the legislative body, without notice, trial or hearing. An act of Congress which has such an effect not only violates the fifth amendment to the Constitution, but is beyond the powers of the legislative department of a republican government, and void."

The Court is also referred to *Levy* v. *Wardell,* 258 U. S. 542; *Forbes Boatline* v. *Commissioners,* 258 U. S. 338; *Union Pacific R. R.* v. *Laramie Stockyards,* 231 U. S. 190; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U. S. 296; *Auffm' Ordt* v. *Rasin,* 102 U. S. 620, 622.

It is petitioner's view that Section 1106 (a) of the Revenue Act of 1926 merely stated the congressional interpretation of the limitation provisions of the preceding Revenue Acts and of the Revenue Act of 1926 when it stated that the effect of such limitations was to extinguish the liability. If, however, another view be taken, *i. e.,* that Section 1106 (a) of the 1926 Act stated a new principle of legislative policy and thereby extinguished the liabilities which had theretofore only been subject to defense, none the less, the plaintiff must here succeed, for it would not then have been competent for the Legislature in 1928 to repeal the enactment of 1926 and by such repeal to revive rights which had thereby been extinguished, or to extinguish causes of action which

had thereby been brought into existence. The repeal of the statute cannot be given such effect.

In *Ware* v. *Hylton*, 3 Dal. 199, at page 242, this Court said:

> "This stipulation could not intend only to repeal laws that created legal impediments to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired under the law, during its existence, and before the repeal."

The Court is also referred to *Society for the Propagation of the Gospel* v. *New Haven*, 21 U. S. 464; *Amy* v. *The Supervisors*, 78 U. S. 136, 138; *Auffm' Ordt* v. *Rasin*, 102 U. S. 620, 622.

(b) *Sections 607 and 611 of the Revenue Act of 1928 cannot constitute a valid ratification of the acts of the Collector in making these illegal collections* because

(1) They do not express the intention to ratify, and because

(2) Congress could not November 14, 1925, the date of the collection, have authorized the collection in advance.

The District Court sought to sustain this legislation as constituting a ratification of the collection (R. 26, 27). Although the Circuit Court of Appeals apparently did not accept this interpretation, the point may arise and merits discussion. The leading cases in this Court lay down two propositions as prerequisite to a ratifying

statute, first, that the statute must be express and leave nothing to implication, second, that the Congress must have had the power at the time that the act was done, to grant authority to the agent sufficient to warrant the act. Upon both of these points these sections fail as ratifying legislation.

The matter can best be demonstrated by a consideration of the leading cases in this Court upon the subject of ratification:

> *Lincoln* v. *United States,* 197 U. S. 419, and *U. S.* v. *Heinszen & Co.,* 206 U. S. 370.

It appears that on July 12, 1898, President McKinley had issued an order to Revenue Collectors authorizing them during the continuance of the war to exact certain imposts in the Philippine Islands. After the conclusion of the peace, the Collectors continued to function, and taxpayers resisted collection upon the ground that their authority had expired. Thereupon, by Act of July 1, 1902 (c. 1369, Section 2, 32 Stat. 691, 692), the Congress adopted a law which was expressly in the nature of a ratification and confirmation, but went no further than to ratify and confirm President McKinley's order and all the acts which were done pursuant thereto. It did not expressly ratify the acts of the Collectors in affecting collections after the peace had been declared. Accordingly, in *Lincoln* v. *United States,* this Court held that the law did not ratify these collections. In his opinion in this case, Mr. Justice Holmes said:

> "Without considering how far the first part of the section extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we have already intimated, the collection of these duties was not."

The Court also pointed out that the alleged ratifying legislation was adopted while the controversy represented by litigation was in progress and that Congress would expressly have covered the acts involved in the controversy, had such been the intention. Certainly, congressional intent to ratify was much clearer in the *Lincoln* case than in the case at bar. Thus far it appears that the intention to ratify must not alone be express but entirely specific in its address to the acts to which the ratification is claimed to apply.

After the decision in the *Lincoln* case, the Congress adopted new legislation which did specifically ratify the act of the Collector in making his collections after the peace had come, and thereupon the *Heinszen* case arose. This Court thereupon affirmed the right of the Congress to ratify acts done merely without precedent authority by its agents and then used the following language:

> "This being done, it is said, reduces the case to the inquiry, Had Congress power, years after goods which were entitled to free entry had been brought into the Philippine Islands, to retroactively impose tariff duties upon the consummated act of bringing the goods into that country? But the proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States. Indeed the contention goes further even than this, since it entirely disregards the important consideration that although the duties were illegally exacted the illegality was not the result of an inherent want of power in the United States to have authorized the imposi-

> tion of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity, to his conduct in enforcing the payment of the duties. And when these misconceptions are borne in mind it results that the unsoundness of the proposition relied upon is demonstrated by the application of the elementary principle of ratification to which we have previously referred."

and again:

> "But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States, Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify."

The decision of the Supreme Court in *Rafferty* v. *Smith etc. Company*, 257 U. S. 226, is of like import.

From a consideration of these cases two principles stand out prominently. ***The first is that the ratifying act must be clear and unambiguous in its intent to ratify. The second is that the Congress must have had the power to authorize, in the first instance, the act ratified at the time when it was done.*** Upon these two points the cases referring to ratification have no effect upon the present controversy.

As to express intention to ratify, we rest our case upon the plain language of Sections 607 and 611. The

Congress would not have had the power on November 14, 1925, to authorize the collection from the plaintiff, because the liability under the 1918 law had been extinguished and because the Congress could not have, on that date, imposed anew the tax for the year 1920 as shown under the next head. Suffice it here to say that this Court in the *Heinszen* case relied upon the mere want of authority on the Collector's part, and refused to be bound to a like position had the Collector's act been illegal at the time when it was done.

(c) *The Congress would have been without authority either in 1925 or in 1928 to impose a new tax liability upon the plaintiff for the year 1920.*

The Court below intimated (R. 38) that the Congress might have had the power in 1928 to impose upon the plaintiff a tax for the year 1920 based upon its 1919 income. We recognize that not all so-called retrospective taxation is unconstitutional. No case, however, has gone so far as to recognize the validity of a law which attempted to impose upon taxpayers liabilities for preceding years. We feel the best way to approach the subject is to consider the types of so-called retrospective legislation which have been held valid.

The first type of such legislation is that in which previously existing laws imposed the tax burden, but due to omissions or negligence or misunderstanding on the part of the assessing authorities, property was either omitted or under-assessed and the administrative machinery provided in the tax statute was inadequate to reach back after a certain period of time had elapsed. In such cases there were no limitations upon the tax liability. The taxing officers were merely given the au-

thority within certain months or periods within which to make their assessment. In these cases it has been held competent for the Legislature thereafter to authorize the assessment of the property at its true value under the pre-existing law. In these cases no new tax was imposed for the years that were past. The old tax burdens were only made subject to collection. Or, to adopt the language of this Court in *White* v. *United States,* 191 U. S. 545,

> "Retrospective laws which have been sustained in the courts have ordinarily had the effect to remedy irregularities in legal procedure, assessment of property for taxation, and the like."

In this class of so-called retrospective tax legislation fall the following authorities among others: *Florida Central Railway* v. *Reynolds,* 183 U. S. 471; *White River Co.* v. *Arkansas,* 279 U. S. 692; *Sturges* v. *Carter,* 114 U. S. 511; *Winona etc. Co.* v. *Minnesota,* 159 U. S. 526; *Weyerhauser* v. *Minnesota,* 176 U. S. 550; *Spencer* v. *Merchant,* 125 U. S. 345.

The second class of so-called retrospective taxation which has been approved by this Court is that where taxes are levied payable in the future, but based upon a state of facts or income which existed or was realized in the past. In other words, the future tax was to be measured by a standard which had already been determined. A compendious consideration of this type of cases appears in the dissenting opinion of Mr. Justice Brandeis in *Untermeyer* v. *Anderson,* 276 U. S. 440. The principle which underlies all such cases, however, is thus stated in *Stockdale* v. *Insurance Companies,* 20 Wall. 323:

> "The right of Congress to have imposed this

> tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted, much less can it be doubted that it could impose such a tax on income of the current year, although part of that year had elapsed when that statute was passed."

Even in cases where the measure of future taxes was determined in the past, this Court has insisted that the law must be reasonable and not arbitrary in even this retrospective feature: *Untermeyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142; *Schwab* v. *Doyle,* 258 U. S. 529; *Nicholas* v. *Coolidge,* 274 U. S. 531.

On the point of unreasonableness alone, we believe that legislation adopted in 1928 to impose taxes because of 1919 income, would be considered arbitrary or unreasonable. But in this case, the law, as suggested by the Court below, would go further, for it would authorize the Congress to adopt in 1928 a tax to be imposed upon taxpayers for the year 1920 based upon 1919 income and, of course, it would also permit the imposition of taxes upon numerous taxpayers for all of the years preceding 1928 in respect of their then past income. No case, so far as our research has disclosed, has gone so far as to warrant such legislation.

The one case in which such subject was discussed was *First National Bank* v. *Covington,* 103 Fed. 523. There the taxes assessed and collected from a national bank in respect of its stock had been declared invalid as being violative of Section 5219 of the United States Revised Statutes. The Legislature of Kentucky thereupon passed a law assessing this bank stock at a different rate (claimed to be equivalent to the rate imposed upon

other moneyed capital) for the years during which the bank stock tax had been invalidated.

The District Court wrote a learned opinion in which it was charged that the power to impose taxes for past years upon property not liable for taxation in those years, amounted to confiscation and the taking of property for public use without just compensation. The case came on appeal to this Court in 198 U. S. 100, where the judgment was affirmed, but upon another ground, *i. e.*, that the taxes might have been justified as being taxes upon the holders of the bank stock under pre-existing personal property taxes, but that under the facts in the case many of the stockholders were non-residents of Kentucky and, therefore, not subject to the tax. This Court, however, did not disapprove the principles announced by Judge Evans in the District Court.

Under the authorities it would seem that legislation attempting as late as 1928 to impose a new tax in the amount here collected for the year 1920, would have been invalid and unconstitutional.

IV. *There is no power in the Congress to take property without due process of law even when such taking may seem fair to the Court.*

We have seen that the District Court disposed of our contention upon the ground that the rule in *Campbell* v. *Holt* applies to the statutory liability for taxes, and further upon the ground that Sections 607 and 611 are ratifying statutes.

The Circuit Court of Appeals apparently did not adhere to this view, but rather took the view that merely out of considerations of fairness and reason, the plaintiff's property should be taken, and hence constitutional

limitations were inapplicable. Thus said the learned Circuit Court of Appeals (R. 38):

> "This is charged to be in violation of the Fifth Amendment, and so it might be, if there had been no original tax, no claim for abatement, no delay of the Treasury in the disposal of that claim, and a consequent loss of all remedies. Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were. It is quite true that the section took away a defense from the plaintiff; he is right to complain unless we can question the kind of defense it was. The moment we do, it must appear to any fair person that he ought not to have it."

We have sought in vain for any determination of this Court which renders the constitutionality or unconstitutionality of a statute which takes property without due process of law, dependent upon the principles thus laid down; upon the sense of fairness and justice of the Court by which the constitutionality of the statute is being considered. Such arguments of fairness, justice and fair play might well also be invoked in favor of the widow who brings too late an action for the death of her husband by the defendant's wrongful act; or in favor of the creditor who seeks to recover his losses from directors of corporations; or in favor of subcontractors

who seek to hold sureties upon bonds written for the general contractor in consideration of premiums paid by the general contractor, and upon indemnity given by him. In all of these cases, an element of fairness, mutual forebearance and reason may be invoked upon the side of him who would obtain the property of his legal adversary contrary to the specific language of the Constitution. Nor is the entire argument of fairness and reasonableness upon the side of the Collector of Internal Revenue. The taxpayer may also invoke such arguments, for this Court in the *Albany Lighterage* case, referred to the "mischiefs to be remedied by setting a time limit against distraint"—mischiefs recognition of which animated the Congress in enacting the limitation statutes.

From a consideration of all of the decisions of this Court, the rule seems to result that constitutional limitations are dependent upon no such consideration; and that the Constitution having been adopted, those who live under the Government established by it must be content to have their rights adjudicated in accordance with its mandates, with full confidence that if its provisions are equally and strictly enforced, irrespective of hardship which may result in any individual case, the largest measure of public and private justice will be assured.

POINT IV.

The unconstitutional effect of Section 611 of the Revenue Act of 1928 may be avoided by applying its provisions only to claims for refund filed after the enactment of that statute.

The language of Section 607 with regard to which the provisions of Section 611 merely act as an exception, is purely prospective. It enacts that certain payments, theretofore or thereafter made *"shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim". It is apparent from this section that the Congress had in mind the proper language to use in describing that which was past, as well as that which was to come, for, with regard to the date of payment it specifically provides "whether before or after the enactment of this Act". With regard to the date of filing the claim for refund, it merely provides "if claim therefor *is* filed". The language therefore is literally susceptible only of prospective construction.

The Court below found that in the case at bar, the claim for refund was filed April 27, 1927 (R. 13), prior to the enactment of the Revenue Act of 1928.

To apply Section 607 to a claim for refund which was filed prior to the enactment of the Act, is to strain at the language of the Section. Inasmuch as the filing of a claim for refund is a condition precedent to the bringing of a common law action against the Collector, it might be possible to sustain the constitutionality of these sections if they were applied purely to claims for

refund filed after the enactment of the Act, for until such condition precedent had been complied with, the right of action against the Collector had not fully matured.

The rule is well settled that where a statute is susceptible of prospective construction, that construction should be given to it, and if a statute is susceptible of such construction as will preserve existing rights of action, that construction will be given to it.

In the case of *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, this Court, at page 314, said:

> "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

For the same principle, the Court is referred to *Texas Cement* v. *McCord*, 233 U. S. 157, 162; *Davidson* v. *Gibson*, 213 U. S. 10, 16; *Title etc. Co.* v. *Harlan & Hollingsworth*, 228 U. S. 567, 571.

So also will the construction be given to the statute which preserves existing rights of action. *Auffm' Ordt* v. *Rasin*, 102 U. S. 620.

CONCLUSION.

We therefore urge that Sections 607 and 611 have no application to the case at bar, for the reason that they apply only to administrative refunds and credits by the Commissioner of Internal Revenue, and not to actions at law against a collector; and further, for the reason that Section 611 in no case applies unless there has been a compulsory stay upon the Collector. If those sections, despite this reasoning, are held to apply, then they are unconstitutional as taking the plaintiff's property without due process of law. Nonetheless, validity might be given to these sections, by attributing to them a purely prospective effect so as to apply to claims for refund filed after the enactment of the 1928 Revenue Act. In such case, however, they would not cover the case at bar. The judgment appealed from should therefore be reversed.

Respectfully submitted,

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